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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term, 1972

No. ~~72-891~~

ANNA MAE BRYANT, Administratrix, Etc., Et Al. - - - - - - - - - Petitioners

versus

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA;
DISTRICT No. 23, UNITED MINE WORKERS OF AMERICA;
W. A. BOYLE, President of International Union, United Mine Workers of America - Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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v.

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA;
DISTRICT NO. 23, UNITED MINE WORKERS OF AMERICA;
W. A. BOYLE, President of International Union, United Mine Workers of America - - - - - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Anna Mae Bryant, Administratrix of the Estate of James McKinley Bryant, deceased; June Creekmore, Administratrix of the Estate of Paul Creekmore, deceased; Gladys L. English, Administratrix of the Estate of Bobby Gene English, deceased; Lola Belle Epley, Administratrix of the Estate of Frankie (Frank) Epley, deceased; Ruby Nell Harris, Administratrix of the Estate of James Gerald Harris, deceased; Verna Jean Miller, Administratrix of the

Estate of Ernest Miller, deceased; Alvin L. Saling, Administrator of the Estate of Dennie Lee Saling, deceased; and Della Sue Rice, Administratrix of the Estate of Will Rice, deceased, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on September 26, 1972.

OPINIONS BELOW

The opinion and order of the District Court is unreported and is printed in the Appendix "A" hereto.

The opinion of the Sixth Circuit Court of Appeals is unreported and is printed in Appendix "B" hereto.

JURISDICTION

The United States District Court for the Western District of Kentucky entered judgment on a motion for summary judgment for the defendants in an action based on violation of The Labor Management Relations Act (Appendix "A"). Petitioners' appeal to the Sixth Circuit Court of Appeals was denied and judgment was entered on September 26, 1972 (Appendix "B"). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a labor union can be liable for wrongful death of a member as a result of negligent performance of its obligation to enforce a union contract.

STATEMENT

All eight of petitioners' decedents were killed as a result of a coal mine explosion that occurred on August 7, 1968 at the River Queen Underground Mine of the Peabody Coal Company in Muhlenberg County, Kentucky. The men were all members of the defendant Union Local No. 1508. It was necessary that they belong to the Union in order to work in the mine. Under the operational setup of the Union at that time, Local Union No. 1508 was under the jurisdiction of District No. 23, United Mine Workers of America which was immediately under the International Union of the United Mine Workers of America. Members of the Executive Board of the International Union and the officers of District No. 23 were appointed by the International President and the International and District No. 23 had complete dictatorial powers, so to speak, over the Local and the Union membership. The International Union, the President of the International, W. A. Boyle, and District No. 23 of the Union were made parties defendant to this lawsuit.

The Union (The United Mine Workers) had negotiated a contract which adopted the Federal Mine Safety Code "as a code for health and safety in Bituminous and Lignite Mines" (Exhibit 1, docket entry 45). It is true that in addition to this statement there is contained in the Union contract a provision labeled "enforcement"; however, these provisions did not eliminate the overall obligation of the Union to enforce the Federal Mine Safety Code as a standard of safety

for the operation of the mine. Indeed the record will reveal that the Executive Board of the International Union recognized this obligation and adopted a resolution in 1956 which provided as follows:

> "79. Was the resolution adopted by the International Executive Board in 1956 which provided as follows:
>
> " 'Each district representative shall know the Federal Mine Safety Code and be made fully responsible for compliance with its various provisions by the various miners within his assigned jurisdiction. He will consider code compliance equal in magnitude with his other assignments, and will diligently strive to influence the responsible officials at the mine property to eliminate code violations, particularly those which have existed during consecutive federal inspections, and have been designated as repeat violations.'
>
> "in effect on August 7, 1968?
>
> "A. Yes.
>
> "79a. Did it apply to District 23, United Mine Workers of America?
>
> "A. Yes, it applied to District 23 representatives." (Docket Entry 48, p. 24)

Of course, this resolution does not become a part of the contract but it is *evidence* of the interpretation the Union placed on the contract insofar as the Union's rights to enforce the Federal Mine Safety Code was concerned. This provision was brought out in the answer to an interrogatory (Interrogatory No. 79 and its answer appearing in Docket Entry 48, p. 24).

The Union had never attempted to inform its membership or even the President of Local 1508 as to the provisions of the Federal Mine Safety Code (Docket Entry 69, p. 122). The petitioners take the position that this, among other things, was evidence of the negligent failure on the part of the Union to enforce the provisions of the contract. By evidence in the record (admittedly in conflict) it was common knowledge among the men that it was standard practice to haul explosives on the drills which were used to drill the seams of coal. This was found to be the cause of the explosion which killed the men. This practice was also forbidden by the Federal Mine Safety Code.

The trial court had before it depositions, interrogatories and their answers, and affidavits filed by the parties, including the Federal Mine Safety Code and the Union constitution, as exhibits. The United States District Judge granted summary judgment to the Union and this action was affirmed by the United States Court of Appeals for the Sixth Circuit. Both Courts held that there was nothing in the language of the contract that *required* the Union to exercise the power. The Court of Appeals admitted:

> "Of course the Union is not without responsibility toward its members with regard to the safety program. Quite apart from obligations created directly by the collective bargaining agreement itself any exclusive bargaining representative has a duty to fairly represent the members of its bargaining unit. This duty includes the obligation to enforce fairly the provisions of any collective bargaining agreement." (Appendix "B", p. 24)

In spite of this accurate statement of the law, the Court held that summary judgment should be awarded against the petitioners.

REASONS FOR GRANTING THE WRIT

After reading the plan mandate of Rule 56 of the Federal Rules of Civil Procedure, it would seem trite to cite authority for the fact that all reasonable inferences should be interpreted in favor of these petitioners on the motion for summary judgment. However, an examination of both the opinion of the United States District Court and the Court of Appeals will reveal that these inferences were interpreted in favor of the Union, the movant. For example, the Court of Appeals stated that petitioners failed ". . . even to show that Union officials had any knowledge of any Code violation at all." (Appendix "B", p. 24) even though the evidence showed that the Union had, by its resolution, quoted above, acknowledged its responsibility for enforcement of the provisions of the Federal Mine Safety Code and even though it was common knowledge in the mine that these provisions were not being followed. If the Union had the responsibility, would this not include the duty to inquire? The Court of Appeals in effect is saying that even though the United Mine Workers International and District, in this instance, had complete dominance over its membership, they could avoid their responsibility by simply closing their eyes and saying that they did not know that there was a violation. With such power should come the duty to inspect, the duty to inquire and the duty to at least make

a reasonable effort to determine whether the provisions of the Code were being followed or not by the signatory companies.

Contrary to the statement made in the opinion of the Sixth Circuit Court of Appeals that they would not consider the resolution quoted above, it is believed that the plain commandment of Civil Rule 56 is that the Court consider *all the evidence before it,* not just that which may or may not have been mentioned by counsel in an argument. Such a rule as indicated by the Court of Appeals would require counsel to point out every shred of evidence that was already in the record. Indeed the tempers of the trial courts would make this almost an impossibility for counsel for a party. We recognize the obligation of counsel to raise any issue of law, but we are aware of no rule that requires the lawyer to specifically point out items of evidence to a trial judge who is hearing the matter on his own, such as a summary judgment hearing. Counsel would very quickly be told that the judge could read and that he had examined the record and he did not need a minute re-reading of that record to him to arrive at a decision.

It will also appear in the record that Peabody (the mine owner and operator) admitted that it was a joint undertaking of the Union and Peabody to acquaint underground mine employees with the Wage Agreement, Federal Mine Safety Code, and State laws (Docket Entry 44, p. 22). Peabody further states that to their knowledge the Union did not carry out any type of safety training (Docket Entry 44, p. 7).

As was stated in *Piercy* v. *Louisville & N. Ry. Co.*, 198 Ky. 477, 248 S. W. 1042, 1045:

> "The primary purpose in the organization of labor unions and kindred organizations *is to protect their individual members* and to secure for them a fair and just remuneration (sic) for their labor *and favorable conditions under which to perform it.* Their agreements with employers look always to the securing of some right or privilege for their individual members, and the right or privilege so secured by agreement is the individual right of the individual member, and such organization can no more by its arbitrary act deprive that individual member of his right so secured than can any other person." (Emphasis added)

While the above is an old Kentucky case, the Labor Management Relations Act, Sec. 301, has been construed to confer upon individuals the right to bring suits for their damages that they have suffered by reason of violation of the contract. 48 Am. Jur. 2d, Labor and Labor Relations, Sec. 1298. The Supreme Court in the case of *Smith* v. *Evening News Asso.*, 371 U. S. 195, 9 L. Ed. 2d 246, 83 S. Ct. 267 (1962), held that an individual employee is not prevented from bringing suit for breach of his contract and employees in such situations are the third party beneficiaries under the contract. This is also the law in Kentucky. *Horn Transfer Lines, Inc.* v. *Morgan*, Ky., 398 S. W. 2d 234.

The United States District Court could not find a ground for awarding damages. The Court of Appeals felt that the District Court was right. In this connec-

tion see *Marranzano* v. *Riggs Nat. Bank of Washington*, D.C., 184 F. 2d 349, 350, wherein the court stated:

> "The right of the party to a contract to sue when damaged by the other party's violation of it does not depend upon the grant of such right by the terms of the contract itself. So the fact that 'This Agreement as drawn grants no right of suit' does not prevent appellant from maintaining this action. The question is, does the appellant fall within any exception to the general rule that a stranger to a contract may not sue to enforce its terms or to recover damages for a violation thereof?"

In *Marranzano* the plaintiff filed a suit as the beneficial member of the union against a newspaper publisher for wrongful discharge. The district judge dismissed the complaint on the grounds that the individual member of the union could not sue for damages because of the breach of the collective bargaining agreement and stated that the agreement as drawn "grants no right of suit." The appellate court held that the plaintiff had a right to try to protect her job and to bring suit in order to do so.

Since the right of one to sue on a contract when damaged by a party's violation of that contract is not dependent upon the terms of the contract itself, it would be a peculiar quirk of the law to deny these plaintiffs a right of action against the Union which has deprived the beneficiaries under the contract of their rights, their safety and their lives through the negligence of the Union.

In the case at bar the Union had the obligation to enforce the provisions of the contract for the benefit of

its membership and this was to see that the standard of the Federal Mine Safety Code was used. As stated in 2 Harper and James, The Law of Torts, p. 1053, § 18.6:

> "In sum, then, liability for negligent nonperformance of contract should be imposed where injury to plaintiff (over and above the mere withholding of performance) is foreseeable and (1) where there is foreseeable and reasonable reliance on the undertaking which has been a cause in fact of the injury, or (2) where the contract is an incident to an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered, as an incident to the enterprise."

It should be pointed out again to the Court that these union members were paying dues each month to the defendant Union which automatically owed them a duty not only to bargain in good faith for them but to make reasonable efforts to enforce the provisions of their contract. This is an obligation under the Labor Management Relations Act (29 U.S.C.A. § 185) and in the case at bar is an obligation by reason of the contract itself.

CONCLUSION

The opinion of the Court of Appeals (Appendix "B") stated:

> "To saddle labor unions with liability for the mine operators' failure to comply with standards introduced into the contract at the union's bidding would simply be to discourage the inclusion of similar or more effective standards in later con-

tracts. Such result would not serve the interest of miners and would retard rather than advance the goals of the National Labor policy." (Appendix "B", p. 25)

Certainly it would not seem that the Union should enjoy some type of special privilege in the law of this country where it would not be responsible to the very people for whom they hold a trust. What could be more important to the working man than safety and his life? If the Union member is to have no rights, of what value is ". . . the inclusion of similar or more effective standards in later contracts."? Indeed why put them in contracts at all?

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles A. Williams, counsel for petitioners herein, do hereby certify that I served a true copy of the foregoing petition (with Appendix) for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on December 15, 1972, by depositing same in a United States mailbox, with first class air mail postage pre-paid, addressed to Edward L. Carey, Attorney at Law, 900 Fifteenth Street, N.W., Washington, D.C. 20005; Harrison Combs, Attorney at Law, 900 Fifteenth Street, N.W., Washington, D.C. 20005; Grant F. Knuckles, Attorney at Law, Asher Building, Pineville, Kentucky 40977; and Albert W. Spenard, Attorney at Law, P. O. Box 142, Madisonville, Kentucky 42431, counsel of record for the respondents.

Charles A. Williams

CHARLES A. WILLIAMS